

In re Requested Extradition of Artt, Brennan, and Kirby:
Counterterrorism and the Court

I. BACKGROUND OF THE CASE 633
II. HISTORICAL ANALYSIS AND BACKGROUND..... 635
III. THE COURT’S DECISION 641
IV. ANALYSIS OF THE COURT’S DECISION 647
V. CONCLUSION 649

I. BACKGROUND OF THE CASE

In 1983, a massive prison break occurred at the Maze Prison in Belfast, Northern Ireland.¹ Among the escaped prisoners were Kevin Artt, Pol Brennan, and Terence Kirby, three self-confessed members of the Irish Republican Army (IRA), an extremist faction of the Catholic-Nationalist-Republican community. The IRA has long been dedicated to the reunification of Northern Ireland with the Republic of Ireland, and to the withdrawal of the Protestant-Loyalist community and the United Kingdom from Northern Ireland.² The escaped prisoners, Artt, Brennan, and Kirby, had been convicted of various violent crimes in courts of the United Kingdom in Northern Ireland and sentenced to prison terms in the Maze Prison.³ Following the Maze Prison break, the three men fled to the United States, where they lived in hiding in California for several years

1. Belfast’s Maze Prison (Maze) is a detention and incarceration facility familiar to many captured IRA members. *See In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. 1253, 1270 (N.D. Cal. 1997). The Maze has been the site of numerous demonstrations by prisoners protesting anti-humanitarian treatment. *See id.* It received worldwide media attention during a hunger strike initiated by prisoners, including Kirby and Brennan, in 1981. *See id.*

2. The struggle between these opposing political factions led to the occupation of Northern Ireland in 1969 by the British Army. *See id.* at 1257-58. Since the occupation, politically motivated violence in Northern Ireland has culminated in the death of citizens and soldiers of both Protestant and Catholic factions and enormous economic and property loss. *See id.* The death toll in Belfast since 1969 was recently reported at 3,200 lives. *See Warren Hoge, Britain Urged to Crack Down on Ulster Prisoners*, N.Y. TIMES, Jan. 5, 1998, at A3.

3. Respondent Brennan was convicted of violating Section 3(b) of the Explosive Substances Act of the United Kingdom for “possession of explosive substances” and “possession of explosives with the intent to injure” in the form of a bomb. *See In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. at 1261. Respondent Kirby was convicted for his participation in the “Cranmore Garden crimes” that involved the taking of hostages and the explosion of a bomb. *See id.* at 1263. Kirby disputes his conviction for the murder of a service station manager in a violent act known as the “Creighton Garages” incident. *See id.* at 1264. Respondent Artt was convicted in 1983 of the 1978 murder of Albert Miles, then deputy governor of the Maze Prison. *See id.*

until their apprehension by United States law enforcement agencies.⁴ The United Kingdom sought extradition of the apprehended fugitives under the Supplementary Treaty of 1985 between the United States and the United Kingdom.⁵ Judge Charles Legge of the United States District Court for the Northern District of California stayed extradition proceedings against Artt and Brennan pending the outcome of a similar request for extradition by the United Kingdom.⁶

Following the district court's denial of extradition in the *Smyth* case in 1994, Legge reactivated Artt's and Brennan's cases and assumed Kirby's case in May of 1995. Judge Legge granted the three men's request for bail in December of 1995, and they were released from United States custody in January of 1996. The Ninth Circuit affirmed bail in December 1996.⁷ Judge Legge was then assigned Kirby's case, and, in December of 1995, the district court granted the three men's requests for bail, a decision that was affirmed on appeal by the Ninth Circuit Court of Appeals.⁸

In August of 1997, the district court, Judge Legge presiding, heard arguments for extradition of the fugitives to the United Kingdom.⁹ Respondents opposed extradition under article 3(a) of the Supplementary Treaty that allows for a denial of extradition based on a showing by a preponderance of the evidence that the request for extradition was made in order to punish them on account of religious and political opinions, or that if surrendered, respondents would be punished by reason of those same opinions.¹⁰ The district court, *holding* that respondents had failed to prove by a preponderance of the evidence that their convictions were based on religious, national, or political beliefs, or that extradition would

4. See *id.* at 1256. The Irish Times reported that "[t]hey were arrested individually in the early 1990s after settling down under false names. Two had married, fathered children and were employed." Sean Cronin, *Extradition of Maze Escapees Confirmed*, IRISH TIMES, Aug. 13, 1997, at 5, available in 1997 WL 12019802.

5. See *In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. at 1256; see generally Extradition Supplementary Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, June 25, 1985, T.I.A.S. No. 12050, available in 1986 WL 312401 [hereinafter Supplementary Treaty].

6. In June of 1993, Charles A. Legge, D.J. stayed extradition proceedings against Artt and Brennan for 15 months, pending the outcome of a connected case, *In re Requested Extradition of Smyth*, 863 F. Supp. 1137 (N.D. Cal. 1994) (denying extradition), *rev'd*, 61 F.3d 711 (9th Cir. 1995) (granting extradition), *cert. denied*, 116 S. Ct. 2558 (1996). See *In re Requested Extradition of Kirby, Brennan, and Artt*, 106 F.3d 855, 855-57 (9th Cir. 1996) (as amended 2/27/97).

7. See *In re Requested Extradition of Kirby, Brennan, and Artt*, 106 F.3d at 855, 857.

8. See *id.* at 857.

9. See *In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. at 1253.

10. The United Kingdom stipulated that following the escape of 38 men in 1983, both recaptured prisoners and prisoners who did not escape were equally brutalized. See *id.* at 1270; see also Supplementary Treaty, *supra* note 5, art. 3(a).

subject them to punishment based on these factors, granted the United Kingdom's request for extradition.¹¹

II. HISTORICAL ANALYSIS AND BACKGROUND

On June 8, 1972, the United States entered into a Treaty of Extradition with the United Kingdom of Great Britain and Northern Ireland (Treaty).¹² The Treaty provided guidelines for a cooperative effort between the two nations in the extradition of fugitive criminals apprehended in a signatory country.¹³ Article III sets forth the offenses for which extradition may be sought¹⁴ and sets forth a requirement of dual criminality that the offense must be one that is recognized as a criminal act under the laws of both the requesting and requested parties.¹⁵ Article V of the Treaty contains a number of exceptions, or defenses to extraditability, including a "political offense" exception.¹⁶ In 1985, the United States and the United Kingdom signed a Supplementary Extradition Treaty (Supplementary Treaty) that effectively amended the main Treaty's "political offense" exception to provide that certain offenses, such as murder, kidnapping, and offenses involving the use of bombs, firearms, or incendiary devices, would not fall within the exception to extradition.¹⁷ In light of the increase in acts of terrorism occurring worldwide, and in particular among extremist Protestant and Catholic factions in Northern Ireland, the adoption of article I suggests that the narrowing of the political offense exception was intended to curtail the availability of asylum to individuals accused or convicted of violent acts committed under the guise of political

11. *In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. at 1253.

12. Treaty on Extradition between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Jan. 21, 1977, 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter Treaty].

13. *See id.* art. I.

14. *See id.* art. III. The Schedule of offenses referred to in art. III(1) includes, in pertinent part: (1) murder, (10) kidnapping, (26) malicious damage to property, and (27) any malicious act done with intent to endanger the safety of persons travelling or being upon a railway.

15. *See id.* art. III(1)(a). The provision states that extradition shall be granted if "the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty." Article 2 of the Supplementary Treaty states, "The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested Party." Supplementary Treaty, *supra* note 5, art. 2.

16. *See* Treaty, *supra* note 12, art. V. The defenses applicable in the case at hand are contained in article V(1)(c)(i) and (ii) and provide that extradition may be denied if the offense is "one of a political character" or the person sought to be extradited proves that the extradition proceeding itself has been brought "with a view to try or punish him for an offense of a political character."

17. *See* Supplementary Treaty, *supra* note 5, art. 1(a-e).

expression.¹⁸ Nevertheless, the Supplemental Treaty did not dispose of the political offense exception. Article 3(a) provides a defense to extradition if the party whose extradition is sought is able to establish, by a preponderance of the evidence, that either the request for extradition had been made with the purpose of trying or punishing him “on account of his race, religion, nationality, or political opinions,” or that if surrendered, he would face punishment or deprivation of his liberty on that same account.¹⁹

The political offense exception, as it has evolved in the United States, has its roots in a decision of the British Divisional Court in 1890.²⁰ In *In re Castioni*, a case that remains seminal regarding the political offense exception, Switzerland sought extradition of a Swiss citizen from Great Britain in order to try him for the murder of a Swiss government official.²¹ The British court formulated what has become known as the “incidence” test, an inquiry into “whether . . . the man was acting as one of a number of persons engaged in acts of violence of a political character with a political objective, and as part of the political movement and [up]rising in which he was taking part.”²² British courts applying the *Castioni* test after its inception imposed a requirement that the political offense be part of a “two-party struggle for political power,”²³ but over time, this requirement was relaxed, and only a showing of “political opposition . . . between fugitive and requesting state” is now necessary.²⁴

In the late nineteenth century, American courts adopted the *Castioni* incidence test with little alteration, construing the political offense exception as requiring only the existence of a political conflict at the time of the charged offense and a relation between the uprising and the offense. In the 1894 case *In re Ezeta*, the District Court for the Northern District of California denied an extradition request by the Salvadoran government for return of individuals accused of murder, holding that the fugitives had committed the crime while attempting to thwart a revolution and therefore

18. It is significant to note that the events of the early 1980s that focused worldwide attention on terrorist activities include: the assassination of Egyptian President Anwar Sadat, the hijacking of the Achille Lauro by Libyan nationals, the “Iranian Hostage Crisis,” and various car and bus bombings that killed military personnel and citizens alike.

19. See Supplementary Treaty, *supra* note 5, art. 3(a).

20. See *In re Castioni*, [1891] 1 Q.B.D. 149 (1890).

21. See *id.* at 150-51.

22. *Id.* at 159.

23. See *Quinn v. Robinson*, 783 F.2d 776, 796 (9th Cir. 1986) (citing *In re Meunier*, 2 Q.B. 415, 419 (1894) that held that the political offense exception would not apply to a French anarchist’s bombing of a café and military barracks, since his “efforts [we]re directed primarily against the general body of citizens” and not part of a contest for political power).

24. See *Quinn*, 783 F.2d at 796 (citing *Schtraks v. Government of Israel* (alterations in original) (citations omitted)).

fell within the political offense exception.²⁵ The United States Supreme Court, unlike the circuit courts, has addressed the political offense exception only once.²⁶ As a result, the incidence test in American jurisprudence has been less the result of a clear statement by the Supreme Court than the lower courts' attempt to find guidance in the Court's brief discussion of the issue.

In *Ornelas v. Ruiz*, decided two years after *In re Ezeta*, the Supreme Court reversed a district court decision denying the Mexican government's request for extradition of three fugitives charged with murder, arson, robbery, and kidnapping.²⁷ The decision's central focus was the extent of the district court's power to conduct habeas review of a circuit court's decision to extradite a fugitive charged, but not yet tried or convicted in a foreign nation, and its power to bar extradition by means of the political offense exception.²⁸ The Court noted that the district court had failed to apply the proper deference to the commissioner's determination of probable cause for arrest and thus exceeded its powers of habeas review in finding that the common crimes with which the fugitive was charged were politically motivated.²⁹ Rather, the Court held that the analysis of the circumstances surrounding the fugitive's acts contained in the findings of the Mexican extradition court revealed that the crimes committed were not sufficiently related to achieving a political end.³⁰ Although the Court employed the incidence test set forth in *Castioni* to determine whether the offense came within the political offense exception, it noted that the mere existence of a political motivation for the crime was not determinative.³¹

Although the incidence test has remained the central inquiry as to what constitutes a nonextraditable, political offense, the lower courts have both expanded and constricted the *Castioni* definition in recent decisions. In *Escobedo v. United States*, decided in 1980, the Fifth Circuit held that "a political offense under extradition treaties [i]s an offense committed in the course of [or] incidental to a violent political disturbance, such as war, revolution and rebellion."³² Ruling favorably on the Mexican govern-

25. See *In re Ezeta*, 62 F. 972, 993, 1005 (N.D. Cal. 1894).

26. See *Ornelas v. Ruiz*, 161 U.S. 502 (1896).

27. See *id.* The Court held that extradition of a fugitive from Mexican justice to Mexico on charges of murder, arson, robbery, and kidnapping was proper where analysis of "the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed" indicated that the offense was not related to any political uprising. See *id.* at 502, 510-11.

28. See *id.* at 508-10.

29. See *id.* at 508-09.

30. See *id.* at 509-12.

31. See *In re Castioni*, [1891] 1 Q.B.D. 149 (1890).

32. *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980).

ment's request for extradition of two United States citizens who faced charges in Mexico of murder, attempted murder, and attempted kidnapping,³³ the *Escobedo* court refused to broaden the political offense exception to include "common crime[s] . . . committed by an ideologically motivated offender."³⁴

In *Eain v. Wilkes*, the Seventh Circuit applied a modified version of the incidence test to determine whether Abu Eain, who had been accused by the Israeli government of setting a bomb in 1979 that resulted in the death of two boys and the injury of thirty others, could assert a defense to extradition based on the political character of his act.³⁵ In denying Eain's motion for habeas corpus relief from extradition, the court distinguished between conflicts involving the activities of military or paramilitary forces and those characterized by individual acts of violence directed at the citizenry.³⁶ Further, the *Eain* court required the party opposing extradition on political offense grounds to establish that his act was political in character by demonstrating a "direct link" between the act and a political conflict.³⁷ Finally, based on the reasoning that the United States should not create a haven for terrorists whose acts were ostensibly nonpolitical in that they targeted citizens rather than military or political personnel, the court excluded violent acts against innocent, nonmilitary civilians and citizenry from the political offense exception.³⁸

Quinn v. Robinson, decided in the Ninth Circuit five years after *Eain*, involved the United Kingdom's request for the extradition of William Joseph Quinn, a self-confessed member of the Irish Republican Army whom British authorities were seeking in connection with a 1975 murder and bombings that took place in 1975 and 1976.³⁹ The United Kingdom sought extradition pursuant to the Extradition Treaty between the United States and the United Kingdom, and Quinn raised the political offense exception as a bar to extradition.⁴⁰ The court identified the issue before it as "whether the political offense exception is applicable to the

33. See *id.* at 1100.

34. See *id.* at 1104 (citing Brief for Pet. Castillo at 35).

35. See *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1980), *cert. denied*, 451 U.S. 894 (1981).

36. See *id.* at 519-23.

37. See *id.* at 521. See also *Koskotas v. Roche* for an example of a case in which the First Circuit declined to recognize as political offenses "common crimes connected but tenuously to a political disturbance." 931 F.3d 169, 171-72 (1st Cir. 1991).

38. See *Eain*, 641 F.2d at 521. In the court's words, "the indiscriminate bombing of a civilian population is not recognized as a protected political act." *Id.* The Southern District of New York has followed the *Eain* court's distinction between acts aimed at military groups and acts directed at civilians. See *In re Doherty*, 599 F. Supp. 270, 277 (S.D.N.Y. 1984).

39. See *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986).

40. See *id.* at 785; see also *supra* note 14 and accompanying text.

type of violent offenses Quinn is alleged to have committed,”⁴¹ namely, murder and the use of explosives. Circuit Judge Reinhardt traced the evolution of the political offense exception and noted that the exception was premised on three primary justifications.⁴² According to the court, these include: (1) the belief that individuals have a “right to resort to political activism to foster political change,” (2) a “concern that [these] individuals . . . not be returned to countries where they may be subjected to unfair trials and punishments because of their political opinions,” and (3) the “notion that governments . . . should not intervene in the internal political struggles of other nations.”⁴³

The *Quinn* court divided political offenses into two categories, one of “pure” political offenses against the government and the other involving “relative” political offenses or “otherwise common crimes committed in connection with a political act.”⁴⁴ Pure political offenses were considered inherently nonextraditable, and relative offenses were subject to further review, but not under the standard incidence test that required “(1) the occurrence of an uprising or other violent political disturbance at the time of the charged offense . . . and (2) a charged offense that is ‘incidental to,’ ‘in the course of,’ or ‘in furtherance of’ the uprising.”⁴⁵ The court rejected the *Eain* court’s absolute exclusion of violent conduct directed at the citizenry as opposed to other military factions, as “contrary to the exception’s fundamental purpose.”⁴⁶ Instead, the *Quinn* court adopted a “liberal nexus” test, requiring only that the person seeking to avoid extradition show, under all the circumstances, that his act was incidental to an uprising of a political nature.⁴⁷ On the part of the court, the liberal nexus test necessitates an “ideologically neutral” inquiry into the political and social climate of the requesting country, the political objectives of the party contesting extradition, and other circumstances that might counsel against extradition.⁴⁸

Shortly after *Quinn*, the Ninth Circuit decided *McMullen v. INS*.⁴⁹ The court’s opinion reveals an attempt to reconcile its rejection in *Quinn* of the *Eain* and *Doherty* courts’ exclusion of certain offenses as “non-political,” with its conclusion in *McMullen* that “terrorist activities

41. *Quinn*, 783 F.2d at 781.

42. *See id.* at 792-810 (discussing the evolution of the political offense exception).

43. *See id.* at 793 (citations omitted).

44. *See id.* at 793-94 (listing treason, sedition, and espionage as examples of “pure” political offenses).

45. *See id.* at 797.

46. *See id.* at 808.

47. *See id.* at 808-09.

48. *See id.* at 804, 808-10.

49. 788 F.2d 591 (9th Cir. 1986).

directed at an unprotected civilian population, including 'indiscriminate bombing campaigns, . . . murder, torture, and maiming of innocent civilians'" were "beyond the pale of a protectable 'political offense.'"⁵⁰ To accomplish this, the court characterized the issue before it as one involving deportation rather than extradition and clothed its adoption of the military-civilian distinction of political acts in a discussion of the policy objectives.⁵¹ The *McMullen* court concluded that the importance of preventing a mass influx of terrorists into the United States justified a less ideologically neutral approach than the Ninth Circuit had previously used, such as a "balancing approach including consideration of the offense's 'proportionality' to its objective and its degree of atrocity."⁵²

In 1995, the Ninth Circuit decided what has become perhaps its definitive statement regarding the political offense exception. In 1994, the United Kingdom brought extradition proceedings in the United States District Court for the Northern District of California, seeking return of prisoner James Joseph Smyth, an IRA member and escapee in the 1983 Maze Prison break.⁵³ The district court was presented for the first time with a defense raised under article 3(a) of the Supplementary Treaty.⁵⁴ The lower court denied the United Kingdom's request for extradition based on its determination that Smyth was entitled to a presumption under article 3(a) due to his political affiliations and that extradition would subject him to punishment or restraint of his personal liberties on account of his religious or political opinions.⁵⁵ The Ninth Circuit, with Judge Schroeder presiding, "reversed," holding that the district court had improperly applied the presumption by failing to require Smyth to demonstrate under article 3(a) of the Supplementary Treaty that he would face mistreatment *on account of his political or religious beliefs*, or other protected factors listed in article 3(a) of the Treaty, if he were extradited to Northern Ireland.⁵⁶

50. *Id.* at 597.

51. *See id.* at 596.

52. *See id.*

53. *See In re Requested Extradition of Smyth*, 863 F. Supp. 1137 (N.D. Cal. 1994), *rev'd*, 61 F.3d 711 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2558 (1996). *See also supra* note 6 and accompanying text.

54. Supplementary Treaty, *supra* note 5, art. 3.

55. *See In re Requested Extradition of Smyth*, 863 F. Supp. at 1155.

56. *See In re Requested Extradition of Smyth*, 61 F.3d at 711, 721. According to the court, "the district court improperly shifted the burden of proof from Smyth to the government in contravention of the treaty provision." *Id.*

III. THE COURT'S DECISION

In the noted case, the district court began its opinion with a brief recantation of the historical context of the struggles between the Catholic-Nationalist-Republican and Protestant-Loyalist political factions in Northern Ireland. The conflict is characterized by escalating violence between the extremists of these factions that ultimately led to the adoption of measures equivalent to a martial law regime.⁵⁷ District Court Judge Legge noted that despite the lesser individual protections afforded by such a justice system in a “virtually war-like setting,” the problems in Northern Ireland would not be ameliorated by implementing a policy of safe-haven for convicted terrorists.⁵⁸ Further, Judge Legge commented, “[T]errorists should not be sheltered from the criminal consequences of their acts just because their acts were committed in the name of a political or religious cause.”⁵⁹ The court stated, as an initial premise, that the adverse conditions in Northern Ireland would not preclude extradition.⁶⁰

Citing the Ninth Circuit’s decision in *In re Requested Extradition of Smyth*, the court set forth the burden respondents were required to meet to avoid extradition under article 3(a) of the Treaty.⁶¹ Adopting the *Smyth* court’s interpretation of the Supplemental Treaty, the court stated:

In order to defeat extradition on the basis of [their] prospective treatment at the hands of the justice system extending beyond the duration of [their] formal imprisonment term[s], [respondent[s]] would have to demonstrate by a preponderance of the evidence that the criminal justice system in Northern Ireland likely would exact additional retribution for his crime beyond the remaining term of imprisonment, and that such additional punishment would be inflicted on account of [respondents’] political or religious beliefs, and not on account of [their] having [committed . . . crimes].⁶²

Further, the court noted that to establish an article 3(a) defense under the Supplemental Treaty, the respondents were required to show either that the purpose of the extradition request was to punish them on account of

57. See *In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. 1258 (N.D. Cal. 1997). The court noted testimony about beatings, incarcerations, random stops and searches, and the implementation of the “Diplock” courts that provided for expedited judicial proceedings for proponents of “terrorist” activities, but curtailed individual civil rights protections. See *id.*

58. See *id.*

59. *Id.*

60. See *id.* at 1259.

61. See *id.* The *Smyth* court held that to avoid extradition under article 3(a) of the Supplementary Treaty, a party must show that the prosecution or punishment is on account of their religious or political beliefs, not their criminal conduct. See *In re Requested Extradition of Smyth*, 61 F.3d at 720.

62. *In re Requested Extradition of Smyth*, 972 F. Supp. at 1259 (quoting *In re Requested Extradition of Smyth*, 61 F.3d at 720) (alterations in original)).

protected factors,⁶³ or that if extradited, respondents would be “prejudiced at . . . trial or punished, detained or restricted in [their] personal liberty”⁶⁴ by reason of the same factors. Inquiry into the respondents’ motion would require a determination as to whether respondents would be punished for their beliefs or for their criminal acts.⁶⁵ Judge Legge defined the scope of the extradition proceeding as encompassing inquiries into whether respondents met their burden of establishing that the courts of the United Kingdom would prosecute or subject them to additional punishment on account of protected factors, whether they had been convicted based on these factors, an assessment of the conditions of the Maze Prison prior to respondents’ escape at the present time, and those conditions that might be anticipated in the future.⁶⁶

The court first addressed respondent Brennan’s motion to be tried under article V(1)(c) of the main Extradition Treaty⁶⁷ as opposed to articles 2 and 3 of the Supplemental Treaty.⁶⁸ Most importantly, the Supplemental Treaty excepts certain offenses from the “political” exception to extradition, including “an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person.”⁶⁹ Article V(1)(c)(i) provides that “the offense for which extradition is requested is regarded by the requested Party as one of a political character” or (ii) that “the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.”⁷⁰ The court dismissed Brennan’s contention that article (1)(d) of the main Treaty did not exclude crimes involving “possession with intent” as immaterial, since the provision excluded crimes involving the use of a bomb that endangered any person, and Brennan’s conviction was for precisely that offense.⁷¹ Upon reviewing the factual record of Brennan’s

63. See Supplementary Treaty, *supra* note 5. Article 3(a) lists prosecution based on race, religion, nationality, or political opinions as grounds for refusal of extradition.

64. See *id.*

65. *In re Requested Extradition of Smyth*, 972 F. Supp. at 1260.

66. *Id.*

67. See Treaty, *supra* note 12, art. V(1)(c).

68. In contrast to article V(1)(c), article 2 of the Supplemental Treaty allows denial of extradition by the requested court upon a determination that there exists insufficient evidence of criminality to sustain a charge under the Treaty’s provisions, but applies a deferential standard of probable cause in the assessment of criminality. Article 3 imposes the heavier burden of proof by a preponderance of the evidence on the party sought to demonstrate that the request for extradition has been made for the purpose of trying or punishing him on account of, among others, his political opinions. See Supplementary Treaty, *supra* note 5, arts. 2, 3.

69. *Id.* art. 1(d).

70. See Treaty, *supra* note 12, art. V(1)(c); see also *supra* note 14 and accompanying text.

71. See *In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. 1261 (N.D. Cal. 1997); see also *supra* notes 3, 12, and accompanying text.

trial and conviction, the court determined that the evidence supported his conviction under Section 3(b) of the Explosive Substances Act of the United Kingdom, that this conviction fell within the excluded “political” offenses of article (1)(d) of the Supplemental Treaty, and as such, his motion must be denied.⁷²

The court next addressed defenses asserted under article 3(a) of the Supplemental Treaty. According to the court, that article impliedly entitles respondents “to prove that their convictions were ‘trumped-up’ for the purpose of convicting them because of the protected factors.”⁷³ However, the court stated, “[i]f there is substantial evidence that they committed the crimes, and . . . the procedures in their convictions met standards of basic fairness, respondents cannot realistically carry their burden of proof that they were convicted because of the protected factors and not because of their guilt.”⁷⁴ Respondent Artt contested his sole conviction, and respondent Kirby contested one conviction, but not his second, based on the alleged involuntariness of their confessions.⁷⁵ Judge Legge noted that the standard set by the Emergency Legislation of the United Kingdom allows a lower standard of admissibility for confessions in terrorist cases than in average criminal cases.⁷⁶ Nonetheless, the court concluded that the discretion retained by trial judges in the United Kingdom to exclude confessions obtained under circumstances that did not meet the definition of “torture or inhumane or degrading treatment”⁷⁷ set forth in the Emergency Legislation provided sufficient safeguards against the admission of patently coerced confessions.⁷⁸ In applying the “fundamental fairness” inquiry, however, the court noted that respondents bore the additional burden of showing that their “confession[s] were] coerced because of the protected factors and not because of the offenses for which . . . respondent[s] [were] arrested.”⁷⁹

In reviewing respondent Kirby’s convictions, the court primarily focused on his conviction for the armed robbery and bombing of the Creighton Garage service station that resulted in the death of the station manager. Kirby did not contest his conviction in the Cranmore Gardens crimes, in which, the court noted, he was “caught red-handed.”⁸⁰

72. See *In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. at 1262.

73. See *id.*

74. *Id.* at 1262-63.

75. See *id.* at 1262.

76. See *id.* at 1263.

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.* at 1263-64; see also *supra* note 3 and accompanying text (describing respondents’ convictions).

Directing its attention to Kirby's confession in the Creighton Garage incident, the court pointed out that "[t]he issue of his confession was never raised before the United Kingdom courts."⁸¹ Addressing Kirby's contention that his confession was obtained following three days of torture and interrogation, Judge Legge noted that although the evidence was sufficient to conclude that Kirby had been subjected to treatment "which would not accord with standards permissible in American courts," Kirby had not established that the interrogations were conducted because of any protected factors, as opposed to his criminal activities.⁸² Perhaps most significant to the court's conclusion that Kirby had failed to establish either an insufficiency of evidence supporting his conviction in the Creighton Garage crime or fundamental unfairness in the trial proceedings, was the observation that Kirby had failed to recant or to contest the validity of his conviction or the voluntariness of his confession during any other stage of the judicial proceedings.⁸³

Judge Legge next addressed respondent Artt's claim of innocence in his 1983 conviction of the murder of the deputy governor of the Maze Prison.⁸⁴ Directing his attention to Artt's confession to the crime, Judge Legge observed that prior to his trial in Northern Ireland, Artt had requested and been granted a suppression hearing on the issue of his confession.⁸⁵ The suppression hearing lasted for seven days, was "exhaustive," and gave Artt "a full opportunity to offer evidence on all of the circumstances of his confession."⁸⁶ The court took notice of the fact that Artt continued to dispute the voluntariness of his confession during his trial, but also weighed the trial court's conclusion that his confession was not coerced.⁸⁷ Judge Legge stated, "This court will assume, as it did with Kirby, that the circumstances of Artt's interrogation were such that this court might find that the confession was involuntary if the issue were first presented here," but Artt had, nonetheless, failed to demonstrate that

81. See *In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. at 1264.

82. See *id.* The court noted that the seriousness of the offense, as well as Kirby's extensive criminal record, and his admission of involvement in the IRA were factors indicating that interrogation was based on Kirby's criminal activities. See *id.* The court further noted that Kirby had confessed to the Cranmore Gardens incident within one hour of interrogation. See *id.*

83. See *id.* at 1264-65.

84. See *id.* at 1265. Albert Miles was murdered at his home in Belfast, Ireland, in 1978. See *id.* That same year, Artt was arrested based on information linking him to the murder, but was later released. See *id.* In 1981, the police arrested a suspect who named Artt as an accomplice in the Miles murder. See *id.*

85. See *id.*

86. See *id.*

87. See *id.* Judge Legge noted that the British trial court had found it "incredible that a young man of Artt's common sense as well as intelligence should confess to a murder which he did not commit . . ." *Id.*

the trial proceedings had been unfair, or that his interrogation had been based on protected factors, rather than the implication by his accomplice.⁸⁸ The court reviewed the events of Artt's trial, including his claims of innocence and assertion of an alibi defense, and ultimately determined that his conviction was obtained fairly and resulted from consideration of his criminal conduct, rather than his religious or political opinions.⁸⁹ Judge Legge considered and dismissed instances Artt raised as indicative of disparate treatment he received on account of protected factors.⁹⁰

The court next considered the special defense asserted by respondent Brennan that he was beaten by members of the British occupational army two days prior to his confession and that the beating should act to bar his extradition under the theory of a "humanitarian international law exception" to extradition.⁹¹ In response, the court asserted that the Ninth Circuit had previously held that the defenses defined in article 3(a) of the Supplemental Treaty were exclusive, and only the Secretary of State of the United States had the discretion to deny an extradition request on humanitarian grounds.⁹² As such, the issue was improperly before the court and would not be considered.

Having concluded that respondents' convictions were valid and had been fairly obtained, the court next addressed the second defense under article 3(a) of the Supplemental Treaty: whether respondents would be "punished, detained or restricted in their personal liberty by reason of the protected factors."⁹³ According to the court, this involved a two-part inquiry into the treatment respondents might receive upon their return to the Maze Prison, and the treatment they would potentially receive upon their ultimate release.⁹⁴ As to the former, Judge Legge observed that the respondents had presented sufficient evidence of prior incidents of guard-

88. *See id.* at 1266. The court further noted that it was not its function to retry Artt in light of his claim of innocence, but instead, merely to determine whether he had been convicted based on factors other than his guilt. *See id.*

89. *See id.* at 1266-68.

90. *See id.* at 1267. Among the incidents Artt raised were various roadblocks and patdowns he was subjected to by members of the Royal Ulster Constabulary (R.U.C.), threats he received from four armed men allegedly belonging to a Loyalist gang, and an incident involving a murder in the bottom floor of his residence that Artt claimed the R.U.C. indicated had been intended for him. *See id.* The court found none of these were related to the protected factors, but were, instead, reasonable reactions to the violence prevalent in Northern Ireland. *See id.* As to the comment purportedly made by the R.U.C. regarding the murder in Artt's residence, the court found that given contradictory testimony, it could not conclude that Artt had met his burden of proving a causal connection between the incident and protected factors. *See id.*

91. *See id.* at 1268.

92. *See id.* *See* Quinn v. Robinson, 783 F.2d at 789-90 (9th Cir. 1986).

93. *See In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. at 1269-70.

94. *See id.* at 1270.

inflicted brutalities, and additionally, the United Kingdom had stipulated that following the 1983 prison break, recaptured prisoners and prisoners who had not escaped during the break were brutalized.⁹⁵ The court noted that, in fact, many prisoners were deserving of damages awards for injuries incurred in the beatings.⁹⁶ Nonetheless, Judge Legge determined that in the fourteen years following the respondents' escape from Maze, conditions at the prison have improved dramatically.⁹⁷ In support of the improvement in condition, he noted that James Smyth, another prisoner who escaped during the 1983 prison break, had been returned to the Maze and had been involved in only one incident since that time.⁹⁸ The court found that the injuries Smyth received had not been inflicted on account of protected factors, but rather as a response to Smyth and other prisoners' attempt to escape from the Maze through an underground tunnel.⁹⁹ The court denied the respondents' request to conduct additional discovery relating to current prison conditions at the Maze following the 1997 attempted escape on the ground noted above, that protected factors had not been shown to be the cause of any recent brutalities.¹⁰⁰

The court next discussed the latter part of the inquiry, whether respondents would suffer additional punishment for their crimes after their ultimate release from prison on account of the protected factors.¹⁰¹ Respondents Artt, Brennan, and Kirby contended that collusion between Protestant-Loyalist military groups, the R.U.C., and the prison authorities would make them easy targets for attack by Protestant-Loyalist extremists.¹⁰² Based on the evidence presented, including a report prepared at the request of the R.U.C. into alleged collusion and security leaks between the prison staff and members of paramilitary groups, Judge Legge found that despite some risk that respondents would be exposed to potential danger or prejudicial treatment following their release, they had failed to prove by a preponderance of the evidence that this potentially

95. *See id.*

96. *See id.*

97. *See id.* As a starting point, the court noted that no prisoner had been killed by a guard in the Maze's history. *See id.* Among notable improvements from pre-1983 conditions at the Maze, the prison currently segregates the Republican-Nationalist prisoners from the Loyalists, and the Republican-Nationalists have been accorded prisoner-of-war status. *See id.* Further, no guards at the Maze carry arms, and the prisoners are able to walk about freely, enjoy recreational activities, enroll in educational programs, and explore both religion and culture as part of prison learning programs. *See id.* at 1270-71.

98. *See id.* at 1271.

99. *See id.*

100. *See id.*

101. *See id.* at 1272.

102. *See id.* Respondents pointed to the high profile nature of their crimes, as well as the increased media attention due to the extradition proceedings as factors that will expose them to increased risk of violence upon their eventual release from the Maze. *See id.*

adverse treatment would be occasioned by their religious or political beliefs, as opposed to reaction to their criminal acts.¹⁰³ Finally, the court observed that the denial of employment opportunities, housing, or benefits that respondents argued would greet their release from prison, was unsupported by the evidence. To the extent it could occur or would occur as a result of “the general conditions under which respondents must live in Northern Ireland [it would be] caused by history and by respondents’ crimes, and not by the protected factors.”¹⁰⁴ Having concluded that the respondents failed to prove they had been convicted, or would be punished, for any reason other than the seriousness of the crimes they committed, the court granted the United Kingdom’s request for extradition with respect to all three respondents.¹⁰⁵

IV. ANALYSIS OF THE COURT’S DECISION

The noted case, while consistent with the evolution of American jurisprudence concerning the political offense exception, and in particular with the Ninth Circuit’s recent decision in *In the Matter of the Requested Extradition of Smyth*, presents a disturbing insight into the judiciary. The court seemingly has abdicated its role as objective arbiter and become, instead, an active implement of the Executive and Legislative branches in the politically popular campaign against terrorism. The district court’s summary dismissal of the constitutional and public policy issues raised with regard to the alleged involuntariness of their confessions, as well as the mistreatment they would receive on return to the Maze Prison in Northern Ireland, is an example of the growing trend within the judiciary. Courts tend to resolve the extradition question in favor of the requesting party by use of constrained interpretation of the political offense exception.¹⁰⁶

In assessing the factual record of respondents Artt and Kirby’s detention, interrogation, and trial, as well as the evidence and testimony presented to the court, Judge Legge found that the evidence supported their contentions that their confessions were coerced by means of beatings, exhaustive interrogation techniques, and other forms of brutality. According to Legge, “the court must conclude from the

103. See *id.* at 1273.

104. See *id.* at 1274.

105. See *id.* at 1275.

106. See, e.g., *In re Request for Extradition of Suarez-Mason*, 694 F. Supp. 676 (N.D. Cal. 1988) (refusing to apply the political offense exception to kidnappings and homicides committed by former Argentine general and stating, “Extension of the exception to former officials effectively protects actions taken in the course of quashing the political activism that the exception was designed to protect. . . . To extend it to protect illegal actions undertaken to suppress [political] evolution contravenes the very purpose of the exception.”).

evidence which was presented that [they were] subjected to treatment during [their] interrogation which would not accord with standards permissible in American courts.”¹⁰⁷

Further, the court noted that “Artt presented certain evidence which might indicate his innocence, or which at least questions his guilt.”¹⁰⁸ Yet, Judge Legge held that in order to prevail, respondents must make a further showing that the mistreatment they received during interrogation that ultimately resulted in their coerced confessions was, itself, inflicted on account of the protected factors listed in article 3(a) of the Supplemental Treaty.¹⁰⁹

In essence, the court held that a violation of the respondents’ due process rights, though sufficient to exclude the confession of an American citizen, was insufficient absent the respondents’ ability to further prove that the motivating factor behind their brutal interrogation was not a desire to gain confessions to the crimes charged, but rather the desire to brutalize them based on their religious or political beliefs.¹¹⁰ Judge Legge failed to reconcile his acknowledgment that the men’s confessions were likely coerced and his recognition of the possibility of Artt’s innocence, with his conclusions. Judge Legge ultimately concluded that there was substantial evidence of respondents’ guilt, that they had received fair treatment during judicial proceedings, and that they were not convicted on account of protected factors.¹¹¹

Requiring the party opposing extradition to prove by a preponderance of the evidence not only that extradition is sought on the impermissible grounds of religion, race, nationality, or political opinion as set forth in article 3(a), but also that the court’s grant of extradition would subject him to punishment based on those protected factors, imposes a nearly insuperable burden on the individual seeking asylum. This burden is imposed because any crime established as politically-motivated by the party seeking to avoid extradition will also be one that the party requesting extradition could punish on the basis of its commission alone.

It defies logic to assume that the Treaty’s proponents intended to provide for exceptions to extradition for only those offenses that could not be established based on the parties’ conduct alone, since the dual criminality requirement of article III of the main Treaty, or article 2 of the Supplementary Treaty, requires that respondents’ *conduct* fall within the

107. *In re Requested Extradition of Artt, Brennan, and Kirby*, 972 F. Supp. at 1264.

108. *Id.* at 1266.

109. *See id.* at 1264-67.

110. *See id.* at 1264.

111. *See id.* at 1262, 1266.

Treaty in order to exercise jurisdiction.¹¹² Neither the main Treaty nor Supplementary Treaty requires respondents to establish that their interrogation was motivated by the protected factors. The court's ruling enables interrogators to claim that any brutality or coercion used to elicit a confession was directed merely at obtaining a confession of criminal activity, not at punishing the subject on impermissible grounds.

In this same vein, the district court's assessment of the conditions awaiting respondents upon their extradition to Northern Ireland and the Maze Prison, or their eventual release from prison, though couched in a purportedly intensive inquiry, ultimately accorded a high level of deference to the factual findings of the British court. The onerous burden imposed by the court, which required that Artt, Brennan, and Kirby prove a politically motivated bias behind every adversity they encountered in interrogations, convictions, or upon their eventual return, was a result of animosity. It reveals a basic shortcoming of the court's interpretation of the article 3(a) exception to extradition. In effect, the district court's deferential approach ignores the fact that the political offense exception is intended to operate as an exception to the court's "long-standing 'rule of noninquiry.'"¹¹³ Although the result obtained is neither unexpected nor unsound in light of the Ninth Circuit's decision in *Smyth*, it turns a blind eye both to human rights deprivations and guarantees of fundamental fairness in an enlightened justice system.

V. CONCLUSION

The political climate in Northern Ireland has long provided fertile ground for conflict, for oppression, and for the tragic bloodshed of Protestant and Catholic countrymen alike. As the unrest grew into violence, and the violence escalated, extremists on either side of the political battle began insidious campaigns of terror, directed first at the establishment, and finally at the innocent men, women, and children of Ireland. Today, the death toll in Northern Ireland has risen into the thousands, and the judicial system, ill-equipped to handle the outgrowth of terrorist or "freedom fighting" activity, no longer has the capacity to provide its citizens with the basic freedoms and guarantees of an enlightened justice system.

We can never fully comprehend the chaos and the terror of a country divided by hatred, compelled to kill its own. When the citizen, or the soldier, or the child, or the man, seeks justice in our courts, we must be ever vigilant to ensure that those basic safeguards, those fundamental

112. See *supra* note 13 and accompanying text.

113. See *In re Requested Extradition of Smyth*, 61 F.3d 714 (9th Cir. 1995).

liberties we hold as undeniable, are not denied when they are needed most. It is the province of the Executive to condemn the violence and call for an end to the terrorism; but it is the duty of the courts to provide fugitives and fellow countrymen alike with justice, fairness, and compassion. Where, as here, respondents have come seeking no more than those rights we as citizens consider fundamental, it is the duty of the court to conduct a meaningful review and make a meaningful determination. The abdication of this responsibility, particularly where a cry for help is raised on those very freedoms we ourselves hold dear, is the abdication of our humanity, our hope, and our honor.

Sandra L.M. Gosser